

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: December 16, 1996

NAME: To the Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Proposition 208's Effect on Excess Campaign Funds and Officeholder Accounts

Proposition 208, entitled "Political Reform Act of 1996," was adopted by California voters on November 5, 1996. Among many other amendments to the state's campaign finance laws, Proposition 208 changes how excess campaign funds may be treated. It also allows creation of "officeholder accounts" as of January 1, 1997, the date when the law takes effect. Several Councilmembers have asked the City Attorney how this new law will affect officeholders' treatment of excess campaign funds and payment of officeholder expenses. These questions are answered in this memorandum, which addresses not only the new state law, but also how local law is affected by it.

The Fair Political Practices Commission (FPPC), the state agency charged with interpreting and administering the Political Reform Act, has begun issuing advice letters interpreting Proposition 208. Their first advice letter issued interpreting the proposition addresses several questions pertaining to officeholder accounts. In Re Johnson, FPPC Priv. Adv. Ltr. A-96-316 (Dec. 10, 1996). Although this letter has not yet been formally adopted by the FPPC as a whole, it is the best guidance we have to date on how this new law will be interpreted. In this memorandum, the City Attorney refers to that letter from time to time. Therefore, a copy of that letter is attached for your convenience.

QUESTIONS AND SHORT ANSWERS

Question 1. Under Proposition 208, can "surplus" campaign funds be used to pay for office supplies? For a breakfast for supporters?

Answer 1. After January 1, 1997, when Proposition 208 takes effect, up to \$10,000 of "surplus" campaign funds may be placed in an officeholder account. That account may be used for an officeholder's office expenses, if those office expenses relate to assisting, serving or communicating with constituents, or with carrying out the official duties of the elected officer. Gov't Code § 85313(a). They may not be used for campaign office expenses. New Gov't Code § 85313(a). After January 1, 1997, any "surplus" campaign money placed in an officeholder account may be used to pay for a supporter's breakfast, only if to do so relates to assisting, serving or communicating with constituents, or with carrying out the official duties of the elected officer. Gov't Code § 85313(a).

Question 2. Can an officeholder account be set up before January 1, 1997?

Answer 2. No. Under current law, an existing campaign account containing excess campaign funds may be used to pay legitimate officeholder expenses. Gov't Code § 89512. But current state law contains no provision expressly permitting "officeholder" accounts.

Question 3. Can up to \$10,000 in surplus funds from a City race be rolled over into an officeholder account?

Answer 3. Yes, when Proposition 208 takes effect, a maximum of \$10,000 of surplus campaign monies, not all surplus monies, held in a campaign account are permitted to be rolled over into a new "officeholder account." New Gov't Code § 89519(a); In Re Johnson, FPPC Priv. Adv. Ltr. A-96-316, page 1, question 1(b).

Question 4. Can an officeholder account be created by rollover only, or are new contributions to the account permitted?

Answer 4. Under Proposition 208, in addition to surplus monies "rolled" over from a campaign account into an officeholder account, contributions may be made to the account, until the \$10,000 cap per calendar year is reached. Except for purposes of campaign reporting and disclosure, contributions to an officeholder account will not be treated as campaign contributions. But Proposition 208 places a limit of \$250 on the amount a candidate may solicit for, and any person may contribute to, an officeholder account. It outright prohibits contributions to an officeholder account from, through, or arranged by, registered lobbyists. Gov't Code § 85313.

Question 5. If new contributions are permitted to an officeholder account, are they attributable to the last election or to some future election?

Answer 5. In contrast with current law, Proposition 208 does not treat contributions to officeholder accounts as campaign contributions, except for purposes of campaign reporting and

disclosure. Gov't Code § 85313(b) and (d). Therefore, contributions to officeholder accounts will not have to be attributed to any particular election.

Question 6. If the officeholder chooses not to run for another office, may the officeholder still create an officeholder account?

Answer 6. Yes. This question is partially answered by the response to questions 4 and 5. Since contributions to officeholder accounts need not be attributed to any particular election, incumbent officeholders may continue to accept up to \$10,000 in contributions per calendar year for their officeholder accounts, even though they do not intend to run for another office.

Question 7. Is an officeholder account specifically authorized under the City's own ordinances?

Answer 7. No. The City's campaign finance laws contain no reference to officeholder accounts or officeholder expenses. San Diego Municipal Code (SDMC) sections 27.2901-27.2975. If the City Council wants to create "officeholder accounts" in its campaign finance laws, the Municipal Code would have to be amended.

Question 8. If local law is inconsistent with new state law governing officeholder accounts, is local law preempted?

Answer 8. Current City law is silent on the issue of officeholder accounts. Therefore, this new state law will govern officeholder accounts established by elected City officials, unless the City Council chooses to adopt its own ordinance.

ANALYSIS

Question 1. Under Proposition 208, can "surplus" campaign funds be used to pay for office supplies? For a breakfast for supporters?

The term "surplus" campaign funds has changed meaning with the adoption of Proposition 208. In contrast with current law, Proposition 208 defines "surplus" campaign funds to include excess campaign monies held by a current officeholder, not simply those excess funds held by a candidate who was defeated or an officeholder who has left office. Gov't Code § 89519. As of the effective date of Proposition 208, up to \$10,000 per calendar year of "surplus" campaign funds may be placed into an officeholder account. Gov't Code § 89519(a). As of January 1, 1997, "surplus" campaign funds above the \$10,000 placed in an officeholder account must be either: (1) distributed to a political party, returned to contributors pro rata, or turned over to the (presumably City's) General Fund (Gov't Code § 89519(b)); or, (2) if the officeholder/candidate

intends to run for a future elective office, transferred to a campaign committee controlled by the candidate before April 1, 1997. In Re Johnson, FPPC Priv. Adv. Ltr. A-96-316, page 2, question 3.

Under Proposition 208, any "surplus" campaign monies placed in an officeholder account may be used only for "expenses related to assisting, serving, or communicating with constituents, or with carrying out the official duties of the elected officer." Gov't Code § 85313(a). Under Proposition 208, an officeholder account may not be used "in connection with any campaign for elective office." New Gov't Code § 85313(a).

We now apply this law to the specific questions posed. After January 1, 1997, up to \$10,000 of "surplus" campaign funds may be placed in an officeholder account. That account may be used for an officeholder's office expenses, if those office expenses relate to assisting, serving or communicating with constituents, or with carrying out the official duties of the elected officer. Gov't Code § 85313(a). They may not be used for campaign office expenses. New Gov't Code § 85313(a). After January 1, 1997, any "surplus" campaign money placed in an officeholder account may be used to pay for a supporter's breakfast, only if to do so relates to assisting, serving or communicating with constituents or with carrying out the official duties of the elected officer. Gov't Code § 85313(a).

Question 2. Can the officeholder account be set up before January 1, 1997?

Current state law contains no provision expressly permitting or recognizing "officeholder" accounts. Rather, current law allows existing campaign accounts that contain excess money to be used for legitimate officeholder expenses. Gov't Code § 89512.

Question 3. Can up to \$10,000 in surplus funds from a City race be rolled over into an officeholder account?

Under Proposition 208, a maximum of \$10,000 in surplus funds, not all surplus funds, may be rolled over into the officeholder account as of January 1, 1997. New Gov't Code § 89519(a); In Re Johnson, FPPC Priv. Adv. Ltr. A-96-316, page 1, question 1(b).

Question 4. Can an officeholder account be created by rollover only, or are new contributions to the account permitted?

Under Proposition 208, in addition to surplus monies "rolled over" from a campaign account into an officeholder account, contributions may be made to the account, until the \$10,000 cap per calendar year is reached. Gov't Code § 85313(b). Significantly, under Proposition 208, contributions to an officeholder account will not be treated as campaign contributions, except for

purposes of campaign reporting and disclosure. Gov't Code § 85313(b) and (d). Proposition 208 places a limit of \$250 on the amount a candidate may solicit for, and any person may contribute to, an officeholder account. Gov't Code § 85313(b). It outright prohibits contributions to an officeholder account from, through, or arranged by, registered lobbyists. Gov't Code § 85313(c).

Question 5. If new contributions are permitted to an officeholder account, are they attributable to the last election or to some future election?

In contrast with current law, Proposition 208 does not treat contributions to officeholder accounts as campaign contributions, except for purposes of campaign reporting and disclosure. Gov't Code § 85313(b) and (d). See also the response to question 4, above. Therefore, contributions to officeholder accounts will not have to be attributed to any particular election. Current FPPC regulations require that officeholder expenses be paid from campaign accounts associated with the election for that specific office. 2 Cal. Code of Regs. § 18525(b). Again, the City Attorney anticipates that this regulation will soon be amended by the FPPC to conform to the new state law.

Question 6. If the officeholder chooses not to run for another office, may the officeholder still create an officeholder account?

This question is partially answered by the responses to questions 4 and 5. Since contributions to officeholder accounts need not be attributed to any particular election, incumbent officeholders may continue to accept up to \$10,000 in contributions per calendar year for their officeholder accounts even though they do not intend to run for another office.

Question 7. Is an officeholder account specifically authorized under the City's own ordinances?

The City's campaign finance laws contain no reference to officeholder accounts or officeholder expenses. SDMC §§ 27.2901-27.2975. The current law requires a candidate to establish one campaign account to run for a particular office. SDMC § 27.2921. Whether it may be used to pay for legitimate officeholder expenses has been treated as a matter of state law, since the City's laws were silent on how campaign monies are to be spent. San Diego City Attorney Memorandum of Law, March 27, 1991. The City Attorney has opined that incumbent officeholders who continue to raise money for their campaign accounts, some of which is destined to be used for officeholder expenses, must abide by the City's campaign contribution limits. San Diego City Attorney Letter to Leo Sullivan, Esquire, February 25, 1985.

If the City Council wants to create provisions governing "officeholder accounts" in its campaign finance laws, the Municipal Code would have to be amended. Proposition 208

expressly permits local governments to adopt ordinances that impose more stringent contribution limits or disclosure requirements than these established by the Proposition itself. Gov't Code § 85706(b). If the City Council wants to adopt a less stringent ordinance, the question of whether the ordinance would be preempted by state law would have to be researched and resolved.

Question 8. If local law is inconsistent with new state law governing officeholder accounts, is local law preempted?

The City Attorney finds that current City law is silent on the issue of officeholder accounts. Therefore, this new state law will govern officeholder accounts established by elected City officials, unless the City Council chooses to adopt its own ordinance to govern officeholder accounts.

CASEY GWINN, City Attorney

By

Cristie C. McGuire
Deputy City Attorney

CCM:jrl:011(x043.2)
Attachment
ML-96-53